06-99001/06-70206

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE RAY ALLEN, Petitioner-Appellant, **v.** **STEVEN ORNOSKI, Warden,** Respondent-Appellee.	**CAPITAL CASE** **EXECUTION IMMINENT - JANUARY 17, 2006**

On Appeal from the United States District Court
for the Eastern District of California
No. S-06-64 FCD
The Honorable Frank C. Damrell. Jr., Judge

RESPONDENT'S OPPOSITION TO REQUEST FOR AUTHORIZATION TO FILE A SECOND/SUCCESSIVE PETITION, TO APPLICATION FOR STAY OF EXECUTION, AND TO ARGUMENTS I THROUGH III IN SUPPORT OF THE REQUEST FOR CERTIFICATE OF APPEALABILITY

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Respondent files this opposition to Allen's requests for authorization to file a second or successive petition, and for a stay of execution. Respondent also files a response to Allen's arguments I through III made in support of his request for a certificate of appealability (COA). These arguments were raised and addressed in filings previously made in the United States District Court for the Eastern District in this matter. Respondent will address Allen's argument IV in support of his request for a COA in a supplemental filing. Argument IV raises a constitutional challenge to the district court's application of 28 U.S.C. § 2254(d), of the Anti-terrorism and Effective Death Penalty Act (AEDPA). Allen asserts this constitutional challenge for the first time, despite his own reliance on the

provisions of AEDPA in his district court filings.

Petitioner Clarence Ray Allen has unsuccessfully contended before the California Supreme Court and the United States District Court for the Eastern District that his execution will violate the Cruel and Unusual Punishment Clause of the Eighth Amendment because of four factors: (1) his advanced age of 76, (2) his chronic physical infirmities including heart disease and diabetes, (3) the length of his 23 year imprisonment on Death Row, and (4) the conditions of his confinement at San Quentin. The California Supreme Court rejected this claim on the merits.

The United States District Court insightfully treated Allen's petition as raising two distinct claims: The first claim was that the Eighth Amendment prohibited Allen's execution because of his physical incapacity. The second claim was that the Eighth Amendment forbade his execution because of the 23 year duration of his confinement in the horrific conditions of San Quentin.

The district court denied the former claim on the merits since the California Supreme Court's denial of the claim on the merits was neither contrary to nor an unreasonable application of clearly established constitutional law within the meaning of 28 U.S.C. § 2254(d). However, the court found that it did not have jurisdiction over the latter claim since it was a successive claim and this Court had

not authorized his petition under 28 U.S.C. § 2254. The United States District Court denied Allen's request for a stay of execution and denied a certificate of appealability. Allen filed a notice of appeal which was immediately forwarded to this Court.

Allen seeks a certificate of appealability in order to challenge the district court's denial of his claim of physical disability and the district court's decision that it lacked jurisdiction to consider the length of confinement claim. Alternatively, he applies for authorization to file a successive petition claiming that his length of confinement on Death Row renders his execution Cruel and Unusual Punishment. Finally, he applies for a stay of execution.

For the reasons given by the District Court and the additional reasons set forth below, this Court should deny all of Allen's requests and dismiss these proceedings.

STATEMENT OF THE CASE

This Court is well familiar with the facts of Allen's "sordid" case. Clarence Ray Allen is a convicted and condemned quadruple murderer.

Over thirty years ago, Mr. Allen set in motion the events leading to this last-minute petition. As a leader of a gang of robbers and thieves in 1974, he burglarized a local Fresno business, Fran's Market, owned by Ray Schletewitz.

One of Allen's accomplices was his son Roger's girlfriend, Mary Sue Kitts. After the burglary, Mary had a pang of conscience. She told Ray's son, Bryon Schletewitz, what Allen had done. When Allen heard that Mary Kitts had "snitched" on him he ordered her execution. Under his direction, Allen's henchmen murdered Mary Kitts and dumped her body in the Friant Kern Canal. For three years, no one knew her fate. In 1977, Allen's role as the mastermind of Mary Sue Kitt's elimination came to light. After he was convicted of two armed robberies in Tulare County, Allen was convicted in Fresno County of the first degree murder of Mary Sue Kitts.

The prosecution witnesses included his accomplices and criminal associates—Eugene Lee Furrow, Chuck Jones, Carl Mayfield, Barbara Carrasco, Shirley Doeckel, and Benjamin Meyers. **However, Bryon and Ray Schletewitz supplied the crucial testimony about Allen's motive–that Mary Kitts had told Bryon that Allen burglarized Fran's Market.**

Allen was imprisoned at Folsom Prison. He befriended fellow inmate, Billy Ray Hamilton. Allen and Hamilton conspired to murder the witnesses who testified against Allen at the Kitts trial. When Hamilton was released on parole from Folsom Prison, he went to Fresno and stayed with Allen's son, Kenneth. Hamilton and his accomplice Connie Barbo arrived at Fran's Market on the night

of September 5, 1980, at closing time. They drew weapons and herded the store employees, including Bryon Schletewitz, into the back of the store. Hamilton then executed Bryon Schletewitz, Douglas White, and Josephine Rocha in a quick, savage series of instantly fatal shotgun blasts. When Hamilton was arrested, he carried a "hit list" with the names and addresses of the witnesses who testified against Allen at the Kitts trial, including Ray and Bryon Schletewitz at Fran's Market.

Allen was charged with capital murder. Due to a conflict of interest, the California Department of Justice stepped into the case to prosecute him. The notoriety of the Fran's Market murders in Fresno led to a change of venue to Glenn County.

During the summer of 1982, a jury in Glenn County convicted Allen of the first degree murders of Bryon Schletewitz, Josephine Rocha, and Douglas White. The jury found true that Allen had a prior murder conviction (the murder of Mary Sue Kitts), had committed multiple murder, and had intentionally killed Bryon Schletewitz in retaliation for his prior testimony and to prevent his future testimony. The jury also convicted Allen of conspiring to murder seven witnesses who testified against him at the Kitts trial.

During the penalty phase, the prosecution presented "particularly weighty" and "overwhelming" evidence of Allen's "grievous and extensive" prior convictions and of 10 separate violent crimes, including a jailhouse assault while he was awaiting trial in this case. (Petn. Exh. 13 at pp. HP0434-HP0439, HP0446, HP0449.) The jury returned three death verdicts. Allen was 52 years old.

Mr. Allen has now spent 23 unsuccessful years trying to have his conviction reversed. The California Supreme Court affirmed the judgment at the end of 1986. When he was almost 57 years old, Allen filed a petition for writ of habeas corpus in the California Supreme Court on December 22, 1987, and thereafter on June 23, 1988, the petition was denied on the merits. In 1992 or 1993, when he was 62 or 63 years old, Allen suffered a second heart attack. Allen filed a second petition for writ of habeas corpus in California Supreme Court on February 10, 1993, and was denied thereafter on June 2, 1993. By the time he filed this second petition in state court, Allen was over 63 years old. In 2001, this Court Allen's petition for writ of habeas corpus. This Court did not finish its consideration of Allen's petition until after Allen was 71 years old. On January 24, 2005, the Ninth Circuit Court of Appeals affirmed the judgment of the district court and said:

> Evidence of Allen's guilt is overwhelming. Given the nature of his crimes, sentencing him to another life term would achieve none of the

> traditional purposes underlying punishment. Allen continues to pose a threat to society, indeed to those very persons who testified against him in the Fran's Market triple-murder trial here at issue, and has proven that he is beyond rehabilitation. He has shown himself more than capable of arranging murders from behind bars. If the death penalty is to serve any purpose at all, it is to prevent the very sort of murderous conduct for which Allen was convicted.

Allen v. Woodford, 395 F.3d 979, 1019 (9th Cir. 2005).

After the Supreme Court of the United States denied Allen's third petition for writ of certiorari, the Superior Court of Glenn County conducted a public session on November 18, 2005, and appointed January 17, 2006, as the date of Mr. Allen's execution.

On December 13, 2005, Allen filed a clemency petition asking the Governor to invoke his state constitutional power to commute his death sentence. To elicit sympathy, Allen raised many of the same claims raised in this successive habeas corpus petition: his advanced age, his medical treatment and his anguish about his long confinement on Death Row.

On December 23, 2005, Allen filed a petition for writ of habeas corpus in the California Supreme Court alleging the claims he repeats in the current petition he now files in this Court. On January 10, 2006, the California Supreme Court denied Allen's petition on the merits and denied his request for a stay of execution.

On January 12, 2006, Allen filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California alleging the same claims previously raised. As detailed above, the District Court denied the petition on the merits and for lack of jurisdiction. Allen's requests for a stay of execution and certificate of appealability were denied. On January 13, 2006, a notice of appeal was filed and immediately forwarded to this Court.

ARGUMENT

I.

ALLEN IS NOT ENTITLED TO A CERTIFICATE OF APPEALABILITY

As noted, Allen requests a certificate of appealability relating to his claim of physical incapacity to be executed and to the district court's finding that it was without jurisdiction to consider his length of confinement claim.

A. Length Of Confinement

The COA request relating to the second claim is quickly dispatched. A certificate of appealability is not necessary when a district court dismisses for lack of jurisdiction. Rather, this Court has jurisdiction to review pursuant to 28 U.S.C. § 1291. *Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004). This does not help Allen very much however. The district court was right that it did not have jurisdiction since a claim based on duration of confinement falls within the rubric of a second or successive petition. *LaGrand v. Stewart*, 170 F.3d 1158, 1160 (9th Cir. 1999); *Gretzler v. Stewart*, 146 F.3d 675 (9th Cir. 1998); *Gerlaugh v. Stewart*, 167 F.3d 1222, 1223 (9th Cir. 1999); *Ortiz v. Stewart*, 149 F.3d 923, 944 (9th Cir. 1998); *Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1998).[1/]

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1. Moreover, the district court was correct that Allen did not have to wait for his duration of confinement claim to get stronger before raising it in his first

Accordingly, the district court must be affirmed. *Hubbard*, 379 F.3d at 1247.[2/]

B. Physical Incapacity

Allen "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This requires more than an absence of frivolity or the presence of mere good faith. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

The district court opinion thoroughly explains that the California Supreme Court's denial of Allen's claims "on the merits" was neither contrary to nor an unreasonable application of constitutional law within the meaning of 28 U.S.C. § 2254(d).

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petition. It is not at all dependent on when an execution date is actually set. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 498 (1991). Contrary to Allen's assertion, the California Supreme Court's order denying his petition on the merits does not establish that his claim was timely under California law. *Evans v. Chavis*, ___ U.S. ___, 2006 WL 42398 (No. 04-721) (Jan. 10, 2006). Furthermore, the "second or successive petition" limitation in AEDPA is a federal procedural rule regarding the filing of federal petitions. Its interpretation is not dependent on state court action.

2. Furthermore, these same authorities compel this Court to deny Allen's request for authorization to file a second or successive petition raising the length of confinement claim.

Allen contends that the district court mischaracterized his claim by bifurcating the "age and infirmity" elements from the "length of confinement" factors. He claims that he united all of those components in one unified Cruel and Unusual Punishment claim. As the district court explained, consideration of the factors of "length of confinement" and "conditions of confinement" is inherent in the "physical incapacity" claim.

Moreover, even if Allen did raise this cumulative claim, he would still not be entitled to relief. The claim still suffers from the defects the district court ascribed to the physical incapacity claim–the California Supreme Court's adjudication of the claim was consistent with the standards set forth in 28 U.S.C. § 2254(b), which prevents the court from granting relief.

Whether a sentence is for death or life, proportionality under the Eighth Amendment is based on objective factors to the greatest extent possible and the amendment forbids only extreme sentences that are "grossly disproportionate" to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). It cannot be argued that the death sentence is "grossly disproportionate" to Allen's crime–triple murder by a murderer already serving a life sentence who conspired to murder seven individuals. He received his "individualized" consideration when the jury decided that the death penalty was the appropriate verdict in his case. As the

district court pointed out, there is no "clearly established law" to govern Allen's claim. The governing rule Allen invokes is too general a standard to support his argument that the California Supreme Court's merits denial was unreasonable. *See Yarborough v. Alvarado*, 541 U.S. 652 (2004).

No objective factors support Allen's new claim of disproportionality. Rather, his contention is a standardless constellation of factors including age, health, length of time on Death Row, and medical treatment. Allen's entire claim is the antithesis of a consideration of objective factors. This claim has no bearing on proportionality of the death sentence to Allen's crime at all. Rather, the claim depends on a series of some after-the-fact issues peculiar to Mr. Allen only. No Eighth Amendment jurisprudence, as articulated by the United States Supreme Court, compels the "category" of prohibited executions Allen advocates.

Unlike the execution of juveniles, there is no basis for prohibiting the execution of a convicted murderer because of advanced age, physical debility, and conditions of confinement. Not a single one of the 38 states with capital punishment prohibit execution on account of seniority or elderliness. *Cf. Ford v. Wainwright*, 477 U.S. 399, 409 (1986). Similarly, except for insanity and mental retardation, there is no prohibition of execution relating to purely physical disabilities. *Atkins v. Virginia*, 536 U.S. 304 (2002).

Allen's attempt to contrive a mythical national consensus against executing prisoners in his position fails. When all is said and done, he can do no more than assert that 12 states prohibit executions of prisoners based on their seniority because those states have no death penalty at all. None of the remaining 38 states, whether their death penalty statutes are on hiatus or not, have such a prohibition. Patently, there is no consensus prohibiting execution of prisoners of advanced years based on state laws. Nor is there any "direction of change" pointing the way toward such a prohibition. *Roper v. Simmons*, 543 U.S.551, 125 S.Ct. 1183, 1193 (2005). Allen cannot even point to a single example of executive clemency on the grounds he now raises.[3/] As Allen concedes, in the last two years, two other inmates who were over 70 years of age have been executed following exhaustion of their legal remedies.

Similarly, Allen's survey of so-called state practices fares no better. Mr. Allen concedes that very few inmates survive into their seventies. Thus, the bare actuarial fact that few prisoners have been as old as Mr. Allen will be when he is executed does not mean that there is a societal reluctance to carry out the death

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3. See summary of reasons for executive clemency since 1977 at the Death Penalty Information Center website (http://www.deathpenaltyinfo.org/article.php?did=126&scid=13).

sentence based on age.[4/]

Allen embraces a definition of "elderly" for inmates over the age of 50. (Petn. Exh. D at p. HPO634.) He notes that the average age of death for inmates on California's Death Row is 47. Yet, to the extent that an inmate over 50 years of age is considered "elderly," at least 155 of the 1004 executions (15% of the total number of executions) since 1977 have involved prisoners aged 50 or more.[5/] Those executions have been performed by 24 different states and the federal government, including 4 executions of prisoners aged 50 or over in California. More tellingly, half of those executions (77.5) have occurred since August 10,

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4. To the extent that international practices are instructive, they do not help Allen's argument. "[I]t is hard to find the requisite elements of [international] custom with respect to [prohibiting] execution of the elderly." W. Schabas, *The Abolition of the Death Penalty in International Law* (3rd ed. 2002) at 374. Indeed, the American Convention on Human Rights only speaks to prohibit executing persons who were over seventy years old when they committed their offenses. (Petn. Exh J at p. HP0686.) Obviously, this prohibition is not pertinent to Mr. Allen's situation since he was only 50 when he committed the Fran's Market Murders. "The reason why this safeguard is not more widely embraced is probably because the rationale for exempting persons on the basis of age per se is less easy to accept than the rationale for exempting the young on the grounds of their lesser responsibility." Roger Hood, *The Death Penalty A Worldwide Perspective* (3rd ed. 2003) at p. 119. Of course, international practice is hardly controlling. *Roper*, 543 U.S. at 1199-1200. Accordingly, on this issue, any citation to international opinion is simply irrelevant. Obviously, as this Court and others have held, this execution would not violate international law under any circumstances. *People v. Brown*, 33 Cal. 4th 382, 403-04 (2004); *Buell v. Mitchell*, 274 F.3d 337, 370-74 (6th Cir. 2001).

5. All but 20 of these executions were involuntary.

2000, which is over 1/5th of the total number of executions since that date (348). Executing "elderly" people, by Allen's definition, is not "unusual" at all. Execution Database, Death Penalty Information Center (DPIC), http://www.deathpenaltyinfo.org/.

Allen notes that only 27 people have been executed since 1692 who were aged 70 or over.[6] However, he fails to note that all but 10 of those inmates were executed in the twentieth century. (Petn. Exh. 3 at p. HP0040.) This statistic says more about the relative improvement in overall life expectancies over the years for the general population than it does about the proportionality of capital punishment for older condemned murderers.[7]

Of course, this all points out the essential illogic of Mr. Allen's position. In actuality, he seems to posit a rule of proportionality solely for himself and his individual circumstances. For instance, he announces no rule or consensus as to the upper age for executions–should it be 76? should it be 66? should it be 50? was Allen, who had already suffered a heart attack, disqualified from the death

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6. The number of executed inmates over the age of 70 is now 29. Mr. Allen's list of 27 inmates does not include either James Hubbard or John Nixon, executed in 2004 and 2005, respectively.

7. The life expectancy for men born prior to 1980 is less than 70 years of age. Nat'l Ctr. for Health Statistics, Health, United States 2004 with Chartbook on Trends in the Health of Americans at p. 143, Table 127 (Hyattsville, Maryland: 2004).

sentence when he was convicted in this case at age 52? Allen has no answer. Nor does he define a threshold of age-related physical infirmities that would render the actual execution of his sentence "cruel and unusual."[8/]

In essence, Allen suggests that there should be a "roving commission" for courts to reexamine the situation of every inmate prior to execution. He offers no guidance on this process. Accordingly, his claim amounts to no more than asking the courts in his case and others to apply their untethered independent judgment about the punishment in their cases divorced from any consideration of the proportionality of the sentence to their crimes. There is no authority compelling this result which sounds more within the province of executive clemency, than judicial adjudication. No national consensus or objective factor supports such a decision.

Allen's argument raises the issue of line drawing based on age that the United States Supreme Court confronted in *Roper*, 125 S.Ct. at 1197-98. Unlike *Roper*, however, in which the Court held the death penalty could not be applied to juveniles under the age of 18 when they committed their crimes, there is no one

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8. Despite his references to the current controversies about medical are at San Quentin, Mr. Allen admits that many of his infirmities are not of recent vintage. Mr. Allen's current medical problems are not uncommon for a person of his age. *See* Luu & Liang, *Case Management: Lessons for Integrated Delivery to Promote Quality Care to the Elderly,* 9 Mich St. U.J. Med.& Law 257, 269 (2005).

particular upper age limit where society draws any useful distinctions based on relative culpability or responsibility for one's own actions. Dredging a "safe harbor" for the condemned based on their advancing years and their natural infirmities adds an unpredictable element totally inconsistent with the rationales for capital punishment, since it creates an incentive for delay in and above the incentive that is already part of the current judicial review process. *See McKenzie v. Day*, 57 F.3d 1493 (9th Cir. 1995).

Allen's argument ignores the reasoning of proportionality cases, with the exception of *Ford v. Wainwright*, 477 U.S. 399, which base their analyses on the culpability of the defendant when the crime occurred. The exception, *Ford*, is based on mental culpability as well–the deterioration of the mind so as to render punishment meaningless. Allen's argument does not involve culpability at all. Nothing about his current condition affects his culpability at the time he committed the Fran's Market Murders. There is no evidence now that he does not understand the gravity and meaning of his current situation facing imminent execution. Quite the opposite.

Furthermore, Allen is wrong that his execution serves none of the penological purposes of capital punishment. Quite the contrary. Allen's present condition is totally irrelevant to the fulfillment of those purposes and sparing his

life would contradict them.

Retribution is "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law." *Id.*, quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J. conc.). The death penalty expresses the "community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.* Allen's attack on witnesses and innocent bystanders, even while he was already serving a life sentence tests organized society's determination to protect its citizens and itself. No "crime strikes a greater blow against the criminal justice system than the murder for hire of a [] witness." *United States v. Holloway*, 29 F.Supp.2d 435, 440 (M.D. Tenn. 1998) (grand jury witness).

Allen's case is also directly related to the deterrence rationale for capital punishment. Here are the prophetic words of *Gregg*:

> There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that

> precedes the decision to act. And there are some categories of murder, such as murder by life prisoner, where other sanctions may not be adequate.

Gregg, 428 U.S. at 196. Allen's case is a paradigm death penalty case. The only way to serve the rationales for the death penalty is to execute him pursuant to the judgment of the jury which first imposed the death penalty in 1982.

Passage of time does not diminish the significance of his case in this regard. Rather, the fact that Allen was able to use the criminal justice system which he so ruthlessly attacked to delay his execution, would mean that he has accomplished his purpose of thwarting that system. He has already shown that anything less than a death sentence is inadequate. The failure now to carry out the sentence will mean that our criminal justice system will have failed again. It failed before when Allen was able to plot and conspire, under the cover of a well behaved inmate, to murder the witnesses who testified against him. By now sparing his life, the system sends the message to the witnesses in his case and future witnesses that it does not care enough to protect them or to protect itself. Thus, reducing Allen's sentence is completely inconsistent to the main purposes of capital punishment. Allen was already serving a life sentence when he committed these triple murders.

Allen was 50 years old when he orchestrated the Fran's Market Murders. Obviously, he was a mature person, totally able to calculate the consequences of his actions, and to be held accountable for them. There was nothing impulsive about his actions. He was the evil influence who manipulated others to do his bidding. He has aggressively pursued all legal avenues. The fact that he now faces execution as a senior citizen is his responsibility. It has no effect on his culpability in terms of his punishment under the Eighth Amendment. Neither his age nor his physical disability entitle him to live out his natural life.

Ultimately, Allen is an especially poor candidate to make this claim. He was already serving a life sentence when he committed the murders for which he has been sentenced to death. As the Ninth Circuit explained, continued imprisonment is not an acceptable option:

> The rationale for incapacitation is to allow society to "protect itself from persons deemed dangerous because of their past criminal history." 1 W. LaFave & A. Scott, *Substantive Criminal Law* 38 §§ 1.5 (2003). Incapacitation is thus used to justify execution "for those offenders believed to be beyond rehabilitation. *Id.* By committing a capital crime while having already been maximally punished and while behind walls thought to protect society, Allen has proven that he is beyond rehabilitation and that he will continue to pose a threat to society. The Supreme Court deems defendants who have committed murder while serving a life term in prison unique among capital defendants. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court "express[ed] no opinion as to whether the need to deter certain kinds of homicide would justify a *mandatory* death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder." *Id.* at 605 n.11,

> 98 S.Ct. 2954 (emphasis added). The Court resolved its ambivalence in favor of such defendants in *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); however, that decision was premised on the fact that a capital murder committed in prison could involve a variety of circumstances, reflecting various levels of culpability. "Just as the level of an offender's involvement in a routine crime varies, so too can the level of involvement of an inmate in a violent prison incident." *Id.* at 79, 107 S.Ct. 2716. Thus, a life prisoner such as Shuman could conceivably commit a capital crime arising out of a violent prison confrontation, *id.*, or, as here, the crime could arise out of calculation and manipulation. The especially aggravating circumstances of Allen's triple-murder and conspiracy are those for which the Supreme Court envisions the harshest penalty.

Allen v. Woodford, 395 F.3d at 1009.

Allen's claims that he should be spared is also based on he period of time he has spent on Death Row. Much of what respondent has already said about Allen's age/infirmity elements applies here as well.

The California Supreme Court and others, including the Ninth Circuit, have repeatedly rejected this perverse claim. *People v. Lenart*, 32 Cal.4th 1107, 1131 (2004); *People v. Frye*, 18 Cal.4th 894, 1030-32 (1998), and cases cited therein; *McKenzie v. Day*, 57 F.3d at 1493; *see also Chambers v. Bowersox*, 157 F.3d 560, 569 (8th Cir. 1998); *Bieghler v. State*, 839 N.E.2d 691 (Ind. 2005). Indeed, "the very nature of capital litigation in both state and federal courts suggests that delay in resentencing to death is the product of evolving standards of decency which inures to the defendant's benefit." *Hill v. State*, 962 S.W.2d 762,

767 (Ark. 1998). Nor is there any proof of severe or relentless psychological stress. *Janecka v. State*, 937 S.W.2d 456, 475-76 (1996); Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting* (2005) 80 Ind. L. J. 155, 193-198.

It is also significant that, although Mr. Allen has been fighting his death judgment for over 23 years, not a single court has found reversible error in his case or faulty procedures necessitating new trials or resentencings. *Compare Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J. dis.); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J. dis.); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J. dis.).

Allen's paid consultant,[9/] former Warden Vasquez, adds nothing to this argument. Vasquez is a correctional consultant and he approaches his task as a "dutiful prison administrator" considering Allen from the standpoint of custodial management. Vasquez's declaration is devoid of any real substance. It contains Vasquez's impressionistic and generalized opinions based on a meeting with Allen. He describes Allen's appearance and demeanor, but he provides no details of what was actually said during the meeting.

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9. San Francisco Chronicle, January 9, 2006 at p. B-7.

Vasquez's views on the propriety of whether an execution will serve a retributive or deterrent effect deserve no more weight than that of any other person. There is no indication that Warden Vasquez has reviewed the records of Allen's trials and crimes or that he is familiar with the prior judicial opinions in Allen's case. He did not sit on the jury in Glenn County and hear the evidence of Allen's murderous prison conspiracies and other multiple violent crimes. He was not the trial judge who heard the evidence and passed sentence. Vasquez's declaration overlooks that Allen has always maintained a disciplinary free record in custody even while he plotted to murder witnesses who testified against him and fabricated evidence.[10/] Allen maintained the same reputable cover for years while leading a gang of criminals on violent crime spree during the mid-1970's in California. Allen's own expert testified that there was no way that Allen could be completely isolated from communicating with other inmates, the very method he used to mastermind the Fran's Market Murders.[11/]

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10. The one "exception" was the aggravating evidence that Allen ordered a jailhouse assault on an inmate while he was awaiting trial in this case in Fresno County. *People v. Allen*, 42 Cal.3d 1222, 1246 (1986).

11. Allen makes much of various cases concerning conditions of confinement on Death Row. However, it is clear that his "Death Row Phenomenon" claim is independent of any claims about the living situation at San Quentin. Indeed, it is questionable that "deplorable conditions of detention" on Death Row are sufficiently compelling to support a claim of "Death Row Phenomenon." *Howell v. Jamaica*, No. 798/1998, U.N. Doc.

Vasquez's description of Allen is at odds with the other admiring descriptions of Allen from his fellow Death Row inmates. (Petn. Exh. 10.) His declaration also contrasts with the far more detailed and informative version of another interview with Allen conducted by another one of his hired experts, Dr. Paul Good. (Petn. Exh. 12.)

Rather than sounding defeated and appearing a mere shadow, Allen remains angry and defiant. He still reminisces fondly of his good life with his ranch house, stables, and airplane. He has had and still has relationships with fellow inmates. His descriptions of life on Death Row would seem to apply to anyone who believes they will be spending the rest of their life in prison whether under a death sentence or not. His statements about being ready to die and his rhetoric about being left to live out his few remaining days are very much contradicted by the fact that he is still seeking laser eye surgery to improve his sight and a stress test to minimize the potential for future heart attacks. Given that Allen has had physical ailments for over thirty years, it is completely speculative how long he will naturally live.

Although Allen describes being on an emotional roller coaster when his execution dates were set, the last time this happened was in 1988, seventeen years

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CCPR/c/79/D/798/1998 (2003), para. 6.3.

ago.[12/] Dr. Good's description is consistent with other reports about Allen which describe him as friendly and cooperative except on the subject of his alleged innocence.

As the district court noted, the appropriate venue for Allen's claim is a petition for clemency to the Governor. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 284 (1998). Allen cannot make a substantial, adequate, plausible, or even colorable showing that the California Supreme Court's denial of his claim was contrary to or an unreasonable application of constitutional law within the meaning of 28 U.S.C. § 2254. Accordingly, reasonable jurists could not find anything but that the district court was "right" when it concluded that Allen was not entitled to relief under AEDPA.

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12. In any event, Allen's execution dates were set to advance the litigation in his case. Any distress he suffered would appear to be attributable to a failure by counsel to "reassure" him of the unlikelihood of execution actually occurring. ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L.Rev. 913, 1082 (2003). Also, Allen's claim that he has been subjected to cruel and unusual punishment due to the repeated scheduling of execution dates does not state a claim and the California Supreme Court's rejection of it was not contrary to nor an unreasonable application of United States Supreme court precedent. *Nevius v. Sumner,* 218 F.3d 940, 946-48 (9th Cir. 2000).

II.

ALLEN IS NOT ENTITLED TO AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE PETITION ALLEGING AN EIGHTH AMENDMENT VIOLATION BASED ON THE DURATION OF HIS TIME ON DEATH ROW

Allen has requested a COA to challenge the district court's disclaimer of jurisdiction over his claim that his extended imprisonment on Death Row. For the same reasons he cannot get the COA, Allen is also not entitled to the authorization. *LaGrand v. Stewart*, 170 F.3d at 1160; *Gretzler v. Stewart*, 146 F.3d 675; *Gerlaugh v. Stewart*, 167 F.3d at 1223; *Ortiz v. Stewart*, 149 F.3d at 944; *Ceja v. Stewart*, 134 F.3d at 1369.

III.

THIS COURT SHOULD DENY ALLEN'S APPLICATION FOR A STAY OF EXECUTION

Allen requests a stay of execution.[13/] This Court should deny his request. "The granting of a stay should reflect the presence of substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1963); *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997); *see also*

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13. Both the United States District Court for the Northern District and the Supreme Court of California have already denied Allen's motions to delay his scheduled execution.

Demosthenes v. Baal, 495 U.S. 731, 737 (1990). ("Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power.") Since Allen's claim is meritless, no substantial or adequate basis exists for a stay.

The preceding argument establishes the unlikelihood that this Court would grant review and that petitioner Allen would prevail. Certainly, the stay equities weigh particularly heavy in favor of the respondent in this particular case. "Equity must take into consideration the State's strong interest in proceeding with its judgment...." *See In re Blodgett*, 502 U.S. 236 (1992); *Delo v. Stokes,* 495 U.S. 320, 322 (1990) (KENNEDY, J., concurring)." *Gomez v. United States District Court for the Northern District*, 503 U.S. 653 (1992). In this case, the evidence of Allen's guilt is overwhelming. As this forcefully explained when it upheld the death judgment, a death sentence is the only punishment consistent with the traditional purposes underlying punishment. Since Allen engineered a triple murder while already serving a life term for murder and was conspiring to murder six additional people, he "continue[s] to pose a threat to society." *Allen v. Woodford*, 395 F.3d at 1019. Accordingly, Allen's motion for stay of execution should be denied. Allen's attempt to persuade otherwise fails. Given the frailty of his claim, he can offer no principled basis for concluding that it was necessary

to wait until now at the last minute to make this claim.[14]

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14. Respondent notes that contrary to Allen's assertion, the California Supreme Court's order denying his petition on the merits does not establish that his petition was timely under California law. *Evans v. Chavis*, ___ U.S. ___, 2006 WL 42398 (Jan. 10, 2006). Furthermore, the "second or successive petition" limitation in AEDPA is a federal procedural rule regarding the filing of federal petitions. Its interpretation is not dependent on state court action.

CONCLUSION

For the reasons stated in this filing, as well as Respondent's supplemental filing, this Court should deny the request for authorization to file a second/successive petition, the request for a certificate of appealability, and the application for stay of execution.

Dated: January 13, 2006

Respectfully submitted,

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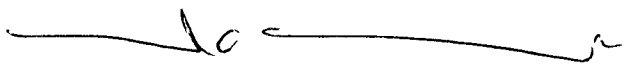

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